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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/629,171	07/31/2000	Michael J. Matsko	8611	4793

26884 7590 10/07/2005

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EXAMINER
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GRAYSAY, TAMARA L

ART UNIT	PAPER NUMBER
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3623

DATE MAILED: 10/07/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/629,171

Applicant(s)

MATSKO ET AL.

Examiner

Tamara L. Graysay

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 20 September 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

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### **DETAILED ACTION**

1. The amendment previously filed on 02 September 2005 has been entered.
2. The amendment filed 02 September 2005 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows:

Applicant has not particularly pointed out where support for the claimed time type categories can be found in the jumbo specification.

The specification includes time type categories at pages 20-21 and Figure 3D, using reference character 370, which includes ring and tender. The list of time type categories presented in amended claims 13-20 has not been found in the specification as originally filed.

Therefore, applicant has not complied with the written description requirement as set forth in 35 U.S.C. 112, first paragraph.

Applicant is required to cancel the new matter in the reply to this Office Action.

### ***Specification***

3. The disclosure is objected to because of the following informalities: Each citation of related applications should be amended to include the application number and, if appropriate, the patent number. Appropriate correction is required.

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4. Applicant is reminded of the proper content of an abstract of the disclosure.

A patent abstract is a concise statement of the technical disclosure of the patent and should include that which is new in the art to which the invention pertains. If the patent is of a basic nature, the entire technical disclosure may be new in the art, and the abstract should be directed to the entire disclosure. If the patent is in the nature of an improvement in an old apparatus, process, product, or composition, the abstract should include the technical disclosure of the improvement. In certain patents, particularly those for compounds and compositions, wherein the process for making and/or the use thereof are not obvious, the abstract should set forth a process for making and/or use thereof. If the new technical disclosure involves modifications or alternatives, the abstract should mention by way of example the preferred modification or alternative.

The abstract should not refer to purported merits or speculative applications of the invention and should not compare the invention with the prior art.

Where applicable, the abstract should include the following:

- (1) if a machine or apparatus, its organization and operation;
- (2) if an article, its method of making;
- (3) if a chemical compound, its identity and use;
- (4) if a mixture, its ingredients;
- (5) if a process, the steps.

Extensive mechanical and design details of apparatus should not be given.

### *Claim Objections*

5. Claims 3, 4, 9, and 10 are objected to because of the following informalities:

- a. Claim 3, line 3, "entry identifier field value" should be entry identifier value for consistency with that recited at line 2 of claim 3. Claim 9 includes a similar inconsistency at line 3, "an entry identification field" should be an entry identifier field value for consistency with that recited at line 4 of claim 9.
- b. Claim 4 line 2, claim 6 line 1, "the entry record" should be the transaction entry record for consistency with the changes made to claim 1. Claim 10 includes a similar inconsistency.

Appropriate correction is required.

***Claim Rejections - 35 USC § 112, first paragraph***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

6. Claims 13-20 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Applicant has not particularly pointed out where support for the claimed time type categories can be found in the jumbo specification.

The specification includes time type categories at pages 20-21 and Figure 3D, using reference character 370, which includes ring and tender. The list of time type categories presented in amended claims 13-20 has not been found in the specification as originally filed.

Therefore, applicant has not complied with the written description requirement as set forth in 35 U.S.C. 112, first paragraph.

***Claim Rejections - 35 USC § 112, second paragraph***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claim 1-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

a. Claim 1, line 18, the term “multiple retail performance metrics” is first recited at this point in the claim. The claim is not clear how this element is related to the previously recited “plurality of retail performance metric records” or if the terms are intended to be the same element. This is complicated by the indefiniteness pointed out in paragraph d.

b. Claim 1, line 19, “the transaction” has antecedent basis in the preamble of the claim; however, the claim is not clear whether the transaction recited at line 19 is related to the transaction entry record recited previously in the claim. The confusion renders the claim indefinite because the claim is not clear whether performing the transaction is part of the method.

c. Claim 1 is confusing. The final step of recording the transaction entry record, the transaction entry record associating multiple retail performance metrics for at least two different types of events occurring within the transaction. This clause is not clear whether there is one step of recording the transaction entry record or whether there are three steps of recording the transaction entry record, associating the plurality of retail performance metric records, and two different types of events occurring. Further the

claim is not clear because the multiple retail performance metric records recited at line 17 is not related to the plurality of retail performance metric records, i.e., they are the same or multiple is intended to mean more than one of the plurality of retail performance metric records.

d. Claim 1 line 16, claim 2 line 2, claim 3 line 3, claim 4 line 2, claim 5 line 2, each recitation of “the retail performance metric record” is indefinite because there are a plurality of retail performance metric records recited in antecedent and the claim is not clear as to which one or whether each of the retail performance metric records is further modified.

e. Claims 7-11 are indefinite for the same reasons as claims 1-5.

f. Claim 13, line 11, “the events” is indefinite because there are a plurality of different events recited in antecedent, so the claim is not clear as to which event is being referred.

g. Claim 13, line 22, the term “multiple retail performance metrics” is first recited at this point in the claim. The claim is not clear how this element is related to the previously recited “plurality of retail performance metric records” or if the terms are intended to be the same element. This is complicated by the indefiniteness pointed out in paragraph j.

h. Claim 13, line 23, “the transaction” has antecedent basis in the preamble of the claim; however, the claim is not clear whether the transaction recited at line 19 is related to the transaction entry record recited previously in the claim. The confusion renders the

claim indefinite because the claim is not clear whether performing the transaction is part of the method.

i. Claim 13 is confusing. The final step of recording the transaction entry record, the transaction entry record associating multiple retail performance metrics for at least two different types of events occurring within the transaction. This clause is not clear whether there is one step of recording the transaction entry record or whether there are three steps of recording the transaction entry record, associating the plurality of retail performance metric records, and two different types of events occurring. Further the claim is not clear because the multiple retail performance metric records recited at line 21 is not related to the plurality of retail performance metric records, i.e., they are the same or multiple is intended to mean more than one of the plurality of retail performance metric records.

j. Claim 13 line 17, claim 14 line 2, claim 15 line 2, each recitation of “the retail performance metric record” is indefinite because there are a plurality of retail performance metric records recited in antecedent and the claim is not clear as to which one or whether each of the retail performance metric records is further modified.

k. Claims 16-18 are indefinite for the same reasons as claims 13-15.

l. Claim 19, penultimate line, the term “multiple retail performance metrics” is first recited at this point in the claim. The claim is not clear how this element is related to the previously recited “plurality of retail performance metric records” or if the terms are intended to be the same element.

m. Claim 20 is indefinite for the same reasons as claim 19.



***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claims 1-3, 6-9, 12, 13, 16, 19 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Walker et al (US-6567787).

a. Regarding claims 1, 13 and 19, Walker teaches a computer implemented method comprising the steps of:

- i. receiving inputs for a plurality of different types of events occurring at a point of sale (POS) during a transaction, wherein the types of events occurring at the POS is at least a key operation and a scan operation (c.8, l.56-60, the POS terminal receives transaction data such as items ordered by a customer and the quantity of each item, transaction data may be received by actuation of keys of the input device, scanning of bar codes or voice input received from a microphone);
- ii. recording (inherent in the creation and existence of a record) retail performance metric records for the plurality of different types of events, each retail performance metric record associating an event type and a time related to performance of the event (c.6, l.53-57, a record of the transaction database defines a plurality of different types of events performed at the POS terminal, the transaction database typically includes a plurality of records such as the record defining a different transaction);

iii. associating the retail performance metric records (percentage of properly spoken verbal messages during key and scan operations) record (330) with the entry record (table 300) (c.9, lines 65 to c.10, l.5, a transaction is initiated 902, a spoken prompt is transmitted 904, the audio signal is received 906 is compared with the prompt to determine whether the audio signal corresponds to the prompt 908, if the audio signal does not correspond then another transaction may be initiated);

iv. recording the transaction entry record indicative of the transaction, the transaction entry record associating multiple retail performance metrics for at least two different types of events occurring within the transaction (910c.5, lines 40-67, the table 300 defines fields for each entry 302,304,306, 308, which specify an operator identifier 320, name 322, authorization level 324, number of transactions 326, number of transactions with properly spoken verbal message 328, percentage of times properly spoken verbal message 330, verbal message complexity 332, voice file 334, weekly bonus 336). Although the reference is primarily concerned with verbal performance, the measurement of other performance events at point of sale terminals is common. For example, a cashier enters the amount of the sale, by whatever means, and then enters the amount of a payment toward that sale. A cash register at a point of sale is not novel and a cash register would inherently track the tender operations of the cashier, e.g., the sale usually includes the time and amount of the transaction and the performance

metric includes different events, such as the time and amount of each sale or transaction.

Walker teaches recording a retail performance metric record, the retail performance metric record being a function of the retail performance metric type (figure 3, ref. char. 330, number of transactions properly spoken); a fixed, determined period of time (c.6, 1.26-28, number of transactions in which a verbal message was spoken properly during a predetermined period of time), and a variable period of time waiting for the occurrence of an event (c.9, 1.9-11, audio signal may also represent sound received during a period of time that ends upon occurrence of a predetermined event). Walker lacks performance as a function of elapsed waiting for and receiving input.

Walker's predetermined time period and predetermined event that end the time period are time, as broadly recited. The measurement over time of an employee performance metric is not novel insofar as the examiner takes Official notice that the computation of a performance metric that includes measuring the metric over time is a well known expedient used for normalizing data to enable comparison of performance among performers. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the performance metric record of Walker to include wait time monitoring as a basis for performance monitoring related to the verbal message during the sales transaction, such as shown by the wait time performance metric in Ozeki and Grant, in order to normalize the data related to the performance metric.

Further regarding claim 13 and the time type categories, a point of sale employee that is not operating or doing anything related to the hardware is inherently in a no time type category.

b. Regarding claims 7, 16 and 20, Walker teaches a computer implemented system comprising: a processor for receiving and transmitting data (figure 2, processor 202); a memory coupled to the processor (c.3, l.45-48, the processor 202 is in communication with a data storage device 204; the memory having stored therein sequences of instructions which cause the processor to receive an input, record an entry record, wherein the instruction sequence particulars of the event and metric record are as discussed with regard to claims 1, 13 and 19, above.

c. Regarding claims 2 and 8, Walker teaches combining the retail performance metric record with the entry record, (c.9, l.65 – c.10, l.2, the performance metric is a prompt to be spoken that is transmitted; the entry record is an audio signal that is received and “combined” when it is compared with the prompt to determine whether the audio signal corresponds to the prompt).

d. Regarding claims 3 and 9, Walker teaches an entry record including a unique entry identifier value and the associating step comprises including the unique entry identifier field value of the entry record with the retail performance metric record (figure

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3, operator identifier, number of transactions in which message spoken properly, and percentage of times message spoken properly.

e. Regarding claims 6 and 12, Walker teaches a method and system wherein the entry record after addition of the retail performance metric record comprises an entry identifier field (figure 16, transaction #12345678), an entry type field (figure 16, item description), a time of entry field (figure 16, time 2:09), and an elapsed time field (c.9, 1.9-11, the audio signal may also represent sound received during a period of time that ends upon occurrence of a predetermined event).

9. Claims 4, 5, 10, 11, 14, 15, 17 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Walker et al (US-6567787), as applied to claims 1, 7, 13 and 16, above, and further in view of Green (WO-97/13229-A1).

Regarding claims 4, 5, 10, 11, 14, 15, 17 and 18, Walker teaches a method and system that use a database to store records on employee performance metrics and on transactions (c.5, 1.24-27, the storage device also stores an operator database, an inventory database, a transaction database, a prompt database). Walker lacks adding a pointer or link to the retail performance metric record.

Green, also in the field of POS performance measurement, teaches linking an employee performance metric to a database field (figure 1, p.4, 1.16-23) through use of a graphical user interface (figure 3 depicts a video screen presentation). The performance metric data is linked via the graphical user interface (p.2, the color assignments and performance are cross-correlated

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with the clerk identification in a digital storage lookup table; the evaluator interacts with the display to review performance) in order to provide a user easy access to the performance data.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to further modify Walker to include links and pointers, as taught by Green, in order to permit easy access to the performance metric data. For example, a POS clerk or manager can easily interface with the information to determine how they are performing with respect to personal goals, company goals, and other clerks or managers.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

10. Claims 13-18 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-4 of U.S. Patent No. 6929177. Although the conflicting claims are not identical, they are not patentably distinct from each other because the distinctions between the claims are:

- a. Input in the patented claims is the operation of the hardware, whereas input in the claims of the present application is scan operations, weighing operations, key operations or tender operations. The examiner takes Official notice that time and motion studies are notorious in point of sale businesses, as evidenced by the background of the invention in the specifications of the patent and the present application. Therefore, the method to determine efficiencies of hardware, as set forth in the patented claims, are equally applicable to human operations as set forth in the present application.
- b. The step of repeating as set forth in the patent claims is no longer included in the scope of the claims in the present application. However, to perform the steps only once,

as claimed in the present application would have been an obvious matter of design choice that was within the level of ordinary skill in the business field because the number of times a study is performed is a matter left to the business entity that is performing the analysis. For example in a pre-hire test situation, a potential employee may be evaluated on proficiency with certain skill sets. In evaluating those skill sets (scan, weigh, key, tender operations), the potential employee may get only one opportunity upon which their skill is evaluated.

c. Further, the claims of the present application require two different types of events occurring within a transaction. As noted in paragraph b, the number of skills or performance evaluation is a matter of design choice that was within the level of ordinary skill in the business time and motion or performance measurement field.



***Response to Arguments***

11. Applicant's arguments filed 02 September 2005, and entered in accordance with the Request for Continued Prosecution filed 20 September 2005, have been fully considered but they are not persuasive.

Applicant argues that the amended claims define over the references because the claims require "different types" of events are tracked as defined in the claims, the examiner points out that the fact that the events are different types is merely a label for the events and not a patentable distinction over the art as applied in the rejection(s) above. Each event is a different type of event (a scan operation or a tender operation at a point of sale terminal) associated with the point of sale transaction. The voice prompts occur during scan and tender operations. And the performance of the employee is tracked and recorded.

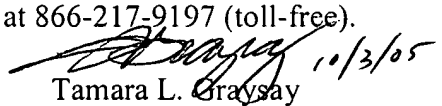
Further, the open ended term "comprise" is used for the list of types of events and time type categories so the claim does not exclude tracking data related to voice records and voice prompts.

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tamara L. Graysay whose telephone number is (571) 272-6728. The examiner can normally be reached on Mon - Fri from 8:30am to 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tariq Hafiz, can be reached on (571) 272-6729. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

 10/3/05  
Tamara L. Graysay  
Examiner  
Art Unit 3623